

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

6 CHAO CHEN,)
7 v. Plaintiff,) C17-5769-RJB
8) TACOMA, WASHINGTON
9) November 20, 2017
10 THE GEO GROUP, INC.,)
11 v. Defendants.)
12 and)
13 STATE OF WASHINGTON,) C17-5806-RJB
14 v. Plaintiffs,)
15)
16 THE GEO GROUP, INC.,)
17 v. Defendants.)

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT J. BRYAN
UNITED STATES DISTRICT JUDGE

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3 APPEARANCES:

4
5 For the Plaintiff ANDREW FREE
6 Chen: ADAM BERGER
7 JAMAL WHITEHEAD
8 DEVIN THERIOT-ORR
9 LINDSAY HALM
10 Attorneys at Law

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12 For the Defendant JOAN MELL
13 GEO: CHARLES DEACON
14 MARK EMERY
15 Attorneys at Law

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17 For the Plaintiff MARSHA CHIEN
18 State of Washington: LA ROND BAKER
19 Assistant Attorneys General

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21 For the Defendant JOAN MELL
22 GEO: CHARLES DEACON
23 MARK EMERY
24 Attorneys at Law

1 MORNING SESSION

2 NOVEMBER 20, 2017

3 THE COURT: Looks like the gang's all here this
00:00:02 4 morning. This is combining a hearing in 17-5806, State
00:00:09 5 versus Geo, and 17-5769, Chen versus Geo.

00:00:17 6 I guess the first thing I should do is, I am not going to
00:00:24 7 try and call roll. If you would make your appearance and let
00:00:29 8 me know who is going to speak for each party.

00:00:33 9 MS. MELL: Joan Mell.

00:00:36 10 THE COURT: Wait a minute. Just a second. Sorry. I
00:00:40 11 don't hear well. It is important you speak right into the
00:00:44 12 mic and keep your voices up, everybody. I don't like to bug
00:00:49 13 you, but I'll bug you if I have to because I have to hear
00:00:52 14 what you are saying.

00:00:53 15 MS. MELL: May I stay seated for purposes of reaching
00:00:57 16 the microphone?

00:00:58 17 THE COURT: A lot louder.

00:01:00 18 MS. MELL: Your Honor, my name is Joan Mell. I
00:01:03 19 represent the Geo Group, Inc. I will be doing the oral
00:01:07 20 presentation. We have co-counsel here, Charles Deacon and
00:01:10 21 Mark Emery.

00:01:15 22 THE COURT: For Geo.

00:01:19 23 MS. MELL: We mixed you up. We are Geo. We are on
00:01:23 24 the defense. You pointed at me. We are in the reverse.

00:01:27 25 MS. CHIEN: Marsha Chien. I am here with La Rond

00:01:32 1 Baker. Between the two of us, we represent the State of
00:01:35 2 Washington.

00:01:36 3 THE COURT: You are speaking for the State?

00:01:38 4 MS. CHIEN: Yes.

00:01:40 5 MR. FREE: Andrew Free, together with Adam Berger,
00:01:43 6 Jamal Whitehead, Devin Theriot-Orr and Lindsay Halm, I
00:01:49 7 represent Mr. Chen. I will be speaking on his behalf.

00:02:29 8 THE COURT: I mention my hearing. It puts a burden
00:02:33 9 on you, but it is important that you speak up, as I
00:02:36 10 indicated.

00:02:37 11 I set this hearing because the motions to dismiss in both
00:02:45 12 cases overlap. I divided time in my order by party. I am
00:02:51 13 not sure that was really fair because the plaintiffs in the
00:03:01 14 case have much the same issues and the defense has to respond
00:03:07 15 to both issues.

00:03:13 16 I guess I want to assure you we will give you the time you
00:03:18 17 need to argue. I set time limits, but I don't follow them
00:03:22 18 very closely. It was my hope we would finish around noon.

00:03:30 19 I am aware of the motion of remand and other things that
00:03:34 20 have gone on in the case. We will deal with those in due
00:03:43 21 course.

00:03:54 22 There is one motion that was noted today that has to do
00:03:57 23 with the filing of the contract. Geo filed a motion for an
00:04:06 24 order declaring the contract filing sufficient and,
00:04:09 25 alternatively, to file limited redacted pages in camera and

00:04:13 1 under seal. That is a two week motion. Not a one day
 00:04:17 2 motion. The defendants -- the plaintiffs have a right to
 00:04:21 3 respond. We will note that for two weeks out.

00:04:31 4 That raises the question of the contract. We got a
 00:04:35 5 contract, I believe, from the State that may not be complete,
 00:04:39 6 and it may be different than the total contract. That is the
 00:04:46 7 one I have been working from because it is the only one I
 00:04:50 8 had. If there are differences, as we discuss this, you can
 00:05:01 9 point them out to me if I am referring to the wrong language.

00:05:08 10 Now, in terms of my preparation, I read all your briefs
 00:05:14 11 and mostly twice, and reviewed parts of them three or four
 00:05:19 12 times. I have looked at the contract considerably. I have
 00:05:27 13 looked at a lot of the law that you have cited. I have
 00:05:36 14 worked with my staff on this, my law clerks, two of them have
 00:05:40 15 been working on this as well.

00:05:43 16 The bottom line is that my main interest here is the
 00:05:47 17 preemption issues. You can discuss the other issues raised,
 00:05:53 18 if you wish to.

00:05:56 19 I think that is all preliminary.

00:06:02 20 Ms. Mell, the burden is on you, I guess.

00:06:07 21 MS. MELL: Your Honor, for purposes of the
 00:06:11 22 allocation --

00:06:13 23 THE COURT: Let me see if these are going to work
 00:06:15 24 now.

00:06:17 25 MS. MELL: Testing, testing.

00:06:22 1 THE COURT: I can hear you. When I talk, I get a lot
 00:06:28 2 of feedback. I don't know what the deal is here. Just a
 00:06:33 3 minute. Try again.

00:06:45 4 MS. MELL: Your Honor, my name is Joan Mell. I am
 00:06:47 5 appearing on behalf of the Geo Corps. It is Geo's position
 00:06:51 6 we would request to reserve the full 15 minutes for rebuttal.

00:06:56 7 Having no objection, I will sit down and wait.

00:07:03 8 THE COURT: Who is next? Mr. Free.

00:07:11 9 MR. FREE: Good morning, Your Honor, can you hear me
 00:07:14 10 okay?

00:07:14 11 THE COURT: Yes.

00:07:15 12 MR. FREE: Let's start with preemption since that is
 00:07:19 13 the concern of the Court. It strikes me there is some
 00:07:26 14 underlying scaffolding we need to do, and we can address the
 00:07:30 15 three forms of preemption that Geo raises.

00:07:32 16 First, there is a presumption against preemption. It is a
 00:07:36 17 function of our federalist system, it is a function of the
 00:07:38 18 fact there is a cooperative relationship between the federal
 00:07:42 19 government and the states. The federal government has never
 00:07:45 20 regulated the entire field of wages. That is a traditional
 00:07:49 21 state function. States regulate. In this case, the State of
 00:07:53 22 Washington has regulated it, in fact, since 1913, even before
 00:07:57 23 the FLSA.

00:07:58 24 The second presumption is if a party is raising a
 00:08:03 25 preemption argument, the party has the burden of proving it.

00:08:06 1 It is not the plaintiff's burden, Mr. Chen or the State of
 00:08:11 2 Washington, to prove the Minimum Wage Act is not preempted.
 00:08:15 3 It is Geo's burden to prove it is.

00:08:18 4 I don't know what they are going to say in that regard
 00:08:20 5 other than what they have said in their brief. To the extent
 00:08:24 6 that Geo raises new arguments in the reply, I would
 00:08:26 7 respectfully request the opportunity to rebut those
 00:08:28 8 arguments.

00:08:30 9 Moving on to the subject, the specific forms of preemption
 00:08:35 10 that Geo has raised. They raised express preemption, field
 00:08:40 11 preemption and conflict preemption. The only thing that they
 00:08:42 12 say expressly preempts the Minimum Wage Act is IRCA, the
 00:08:45 13 Immigration Reform Control Act of 1986, specifically 8 U.S.C.
 00:08:50 14 1324a(h)(2), which is IRCA's express preemption clause.

00:08:56 15 When Geo is discussing in their brief prior cases like
 00:09:02 16 Alvarado Guevara that indicate this longstanding recognition
 00:09:08 17 that state wage claims have no bearing, or that federal wage
 00:09:13 18 claims have no bearing on the federal scheme, that's not
 00:09:16 19 relevant to express preemption. The only express preemption
 00:09:20 20 argument that I understand that they have raised in either of
 00:09:22 21 the briefs is the IRCA preemption.

00:09:24 22 What does IRCA preempt? IRCA expressly preempts any state
 00:09:31 23 or local sanction relating to the hiring or employ of
 00:09:34 24 undocumented immigrants. Two parts of that, we raised in our
 00:09:38 25 brief. You have the quality of being a sanction, which is

00:09:42 1 the Second Circuit and Affordable Housing, the New York
 00:09:45 2 Supreme Court in IDR vs Balbuena has defined specifically it
 00:09:50 3 is a punishment. That is not the back wages Mr. Chen seeks.

00:09:56 4 I will let the State speak to it separately about the
 00:09:59 5 other forms of relief in this case.

00:10:01 6 Back wages are not a sanction, and courts across the
 00:10:05 7 country have recognized that. Even if they were, which they
 00:10:08 8 are not, it is a sanction for hiring undocumented immigrants
 00:10:13 9 or allowing those undocumented immigrants to be employed.
 00:10:17 10 That is not what the Minimum Wage Act does. The Minimum Wage
 00:10:21 11 Act provides a specific bottom level of \$11 an hour for every
 00:10:27 12 worker, regardless of immigration status.

00:10:29 13 After Hoffman Plastics, which is a Supreme Court case,
 00:10:35 14 which says IRCA might interfere with NLRA -- National Labor
 00:10:40 15 Relations Act -- if you were to require reinstatement, courts
 00:10:42 16 across the country began addressing claims of whether an
 00:10:46 17 undocumented person can recover back wages for hours of work
 00:10:49 18 below the minimum wage. In other words, can an employer get
 00:10:52 19 out of having to pay for the labor they have obtained simply
 00:10:55 20 because the person that gave the labor is undocumented.

00:10:58 21 Courts across the country, as we set forth in our brief,
 00:11:02 22 said no, no because that would encourage employers to skirt
 00:11:05 23 the requirements. It would suppress wages across the labor
 00:11:09 24 market. FLSA and the Minimum Wage Act are labor-market
 00:11:13 25 centric. They recognize that when one employer suppresses

00:11:18 1 wages for one set of workers, the rest of the employers are
00:11:22 2 subjected to unfair competition. It would frustrate the
00:11:26 3 congressional purpose of making sure everybody is getting
00:11:29 4 paid a minimum wage. It would frustrate the legislative
00:11:33 5 purpose in Washington. IRCA does not preempt the Minimum
00:11:37 6 Wage Act.

00:11:45 7 THE COURT: Let me ask you, there are some inmates on
00:11:52 8 the Tide Flats that are authorized to work in this country;
00:11:56 9 some are not, as I understand it. Do we have to look at all
00:11:59 10 of this in two different tracks in order to determine what
00:12:04 11 may be preempted and what may not be?

00:12:07 12 MR. FREE: Not for the purposes of express
00:12:10 13 preemption, Your Honor, is my answer, and I'll explain it and
00:12:13 14 unpack it.

00:12:14 15 First of all, it is really important to recognize these
00:12:17 16 are not inmates. They are civil detainees that can't be
00:12:20 17 forced to work. All of their work is being given to Geo
00:12:24 18 because supposedly they volunteer it. Unlike all the cases
00:12:29 19 that Geo cites where they are analogizing to prisoners who
00:12:33 20 have been convicted of a crime, are criminal detainees,
00:12:35 21 immigration detainees are different. They are civil
00:12:39 22 detainees.

00:12:39 23 THE COURT: Detainees and not inmates.

00:12:42 24 MR. FREE: The second point is you are -- if you were
00:12:45 25 to get to the question of employment status, you would see

00:12:49 1 that, yes, a lot of people in the Tide Flats, in the Tacoma
00:12:52 2 Northwest Detention Facility, do have work authorization. A
00:12:56 3 significant portion of the 1,575 people there either were
00:13:01 4 permanent residents and are currently undergoing an
00:13:04 5 administrative proceeding or have authorization to work
6 through pending asylum applications, through pending
00:13:11 7 cancellation of removal applications or have a bona fide
00:13:12 8 claim to U.S. citizenship, frankly. So, yes, there are
00:13:14 9 people there who can be working.

00:13:16 10 That is a question for conflict preemption analysis. That
00:13:20 11 is not a question for express preemption analysis. Because
00:13:23 12 the express preemption question is, is the Minimum Wage Act
00:13:29 13 properly subject to 8 U.S.C. 1324a(h)(2), which is the
00:13:35 14 sanction provision.

00:13:36 15 If you would like for me to address that question in the
00:13:39 16 context of conflict preemption, I can. If 1324a(h)(2) doesn't
00:13:45 17 cover back pay, it doesn't matter whether they are
00:13:48 18 authorized. That is our argument. It doesn't cover that.
00:13:51 19 It is not a sanction for the hiring of undocumented
00:13:54 20 immigrants, and therefore congress did not preempt the
00:13:58 21 Minimum Wage Act.

00:14:04 22 THE COURT: The effect of 1324a(a)(1)(A) would be if
00:14:11 23 these people are truly employees, it would make Geo a
00:14:20 24 criminal for hiring them.

00:14:28 25 MR. FREE: First of all, you have the state law

00:14:30 1 question. These are Minimum Wage Act claims under Washington
 00:14:33 2 state law. Federal law would be a separate question. Your
 00:14:39 3 Washington state law requires that everybody who does work in
 00:14:44 4 Washington gets paid the minimum wage unless they are subject
 00:14:46 5 to exemption. Period. If there are consequences to Geo for
 00:14:51 6 that, then that is the impact of Washington state law.

00:15:00 7 With respect to field preemption, unless the Court has
 00:15:03 8 questions about express preemption, Geo has, in its reply
 00:15:08 9 brief to our response, expressly foreclosed a regulatory
 00:15:11 10 preemption argument. That is at pages four and five in Note
 00:15:15 11 13 of Geo's reply brief. What they say is the agency, we,
 00:15:20 12 Geo, are not claiming that the agency has preempted the
 00:15:23 13 field.

00:15:29 14 They go through this entire exercise in their motion to
 00:15:33 15 dismiss discussing the complex statutory, regulatory and
 00:15:36 16 policy framework, discussing how congress, through its
 00:15:37 17 express and delegated statutory authority, has occupied the
 00:15:41 18 field of immigration detention and labor.

00:15:44 19 Then when we point out that there are certain requirements
 00:15:48 20 that an agency must go through if it is going to preempt
 00:15:52 21 state law under executive orders, under federal law, none of
 00:15:56 22 that is in the record here. In fact, it is the opposite.
 00:15:58 23 Under PBNDS, the Performance Based National Detention
 00:16:02 24 Standards, that ICE promulgated, they say at least a dollar a
 00:16:06 25 day. In practice, Geo pays employees, detainees in other

00:16:11 1 facilities more than a dollar a day. There is not that
00:16:14 2 regulatory record. They foreclosed that argument. They
00:16:19 3 expressly disclaim regulatory exemption. So we are stuck with
00:16:22 4 field preemption on the statutes they cite.

00:16:24 5 Those statutes, particularly 8 U.S.C. 1231(g), which deals
00:16:30 6 with the location of detention centers and the secretary's
00:16:33 7 authority to come up with locations for detention, and 8
00:16:36 8 U.S.C. 1103(a)(11)(B), which deals with the secretary's
00:16:41 9 authority to contract with state or local government for the
00:16:45 10 detention and safekeeping of detainees, to enter into
00:16:49 11 agreements to do that. Most relevantly, I think, is 8 U.S.C.
00:16:54 12 1555(d) which says -- congress said that congress --
00:16:58 13 appropriations shall be available for the payment of
00:17:03 14 allowances to immigrant detainees at a rate that congress
00:17:08 15 shall set from time to time in the Appropriations Act
00:17:12 16 involved. I can read the direct quote if you like. That's
00:17:16 17 the message.

00:17:17 18 The last time congress did that was in 1978. It hasn't
00:17:22 19 done anything since. The agency has continued to run the
00:17:25 20 dollar a day program. In fact, it is said you can do more,
00:17:29 21 you can pay them more, but you must pay them at least a
00:17:32 22 dollar a day.

00:17:34 23 No party in this case, including Geo and ICE, a non-party,
00:17:39 24 has behaved as though that is the ceiling. Not since 1978.
00:17:46 25 Almost 40 years. Okay?

00:17:49 1 None of the statutory citations that Geo provides forms
00:17:53 2 the complex federal statutory scheme that would foreclose any
00:18:00 3 state action. The reason we know that is through Arizona vs
00:18:04 4 United States.

00:18:04 5 In Arizona vs United States, the Supreme Court looked at a
00:18:08 6 number of actions taken by the legislature in the state of
00:18:11 7 Arizona. It said, if we put all these things together, it is
00:18:15 8 clear that with respect to certain parts of the statute
00:18:17 9 congress acted, and there can be no room for other state
00:18:22 10 regulation.

00:18:23 11 With respect to others, other parts of this statute,
00:18:27 12 particularly the identification provisions of Arizona's law,
00:18:31 13 that's a traditional police power that is governed by
00:18:34 14 preemption principles. They said that can go forward, and it
00:18:38 15 did. Similarly, you look at a regulation or alien
00:18:42 16 registration provision like you have in Heinz and in other
00:18:45 17 cases, that is a complete federal scheme where the federal
00:18:49 18 government, by statute, has conveyed what needs to happen,
00:18:53 19 has reserved to itself what needs to happen in clear terms
00:19:00 20 that foreclose any possibility of cooperative federalism.

00:19:03 21 That is not the case here. How do we know? We look at
00:19:07 22 the contract. The contract says that when there is an
00:19:10 23 ambiguity between the contract, federal law and state law,
00:19:15 24 you are going to observe the most stringent requirement. The
00:19:20 25 contract sets forth the constraints that Geo has to follow as

00:19:24 1 part of its performance down at the Tide Flats. Those
00:19:28 2 constraints include applicable state and local labor codes,
00:19:33 3 applicable state and local health and safety codes.

00:19:37 4 To say, well, we have this cooperative federalism with
00:19:41 5 regard to health and safety, with regard to some state and
00:19:44 6 local labor codes, but not others, embarrasses the argument
00:19:50 7 that congress has field preempted all immigration detention.
00:19:55 8 It is just not the case.

00:19:56 9 We explained in our brief what you have to have if you are
00:20:01 10 going to field preempt something, and we don't have it. I
00:20:04 11 think where the closest question is for the Court is, is this
00:20:06 12 conflict preempted. Geo claims that if it was forced to pay
00:20:13 13 Mr. Chen, and the punitive class he seeks to represent,
00:20:17 14 Washington's minimum wage would present a conflict to the
00:20:25 15 accomplishment of the purposes set forth in federal law.
00:20:28 16 Under Geo's claim, if that's true, then the Minimum Wage Act
00:20:30 17 is preempted.

00:20:32 18 Let's unpack that idea for a second. If Geo is right,
00:20:37 19 every federal contractor that is subject to a federal law and
00:20:43 20 a state law is going to be able to say that if compliance
00:20:48 21 with the state law gets too expensive, so expensive in fact
00:20:53 22 that they might not want to do it any more, then that state
00:20:56 23 law is preempted. That would be the government contractor
00:21:01 24 defense that has been raised in United States vs Boyle.

00:21:04 25 Geo didn't raise the government contractor defense here.

00:21:07 1 They have not raised the government contractor defense, and
00:21:10 2 it is because that government contractor defense has failed
00:21:13 3 elsewhere. Doesn't apply.

00:21:16 4 The idea that the company's expense and compliance with
00:21:21 5 the law can provide a basis for preempting a state law has
00:21:27 6 never been supported by any court. That is the sort of
00:21:31 7 elemental question.

00:21:33 8 Then we can unpack it a little more. As a practical
00:21:36 9 matter, it is not just a hypothetical conflict that they have
00:21:39 10 to prove. They have to prove there will be an actual
00:21:41 11 conflict. It can't just be a tension between federal law and
00:21:45 12 state law. It has to be irreconcilable, and we have to know
00:21:49 13 it is going to happen.

00:21:50 14 The very important point from this record at this stage of
00:21:54 15 the case is there has been no discovery. We have
00:21:57 16 out-of-court statements and footnotes from a corporation that
00:22:01 17 has a monetary interest in not complying with the law, not
00:22:04 18 having the law applied to it. We have had no opportunity to
00:22:07 19 cross-examine anybody. We have had no opportunity to test
00:22:10 20 what the agency's position on this is. We haven't heard from
00:22:13 21 the federal government. Why aren't they here? Geo hasn't
00:22:17 22 moved to dismiss for failure to join an indispensable party.
00:22:21 23 The government has intervened.

00:22:23 24 We are sitting here on a paper record that consists of
00:22:25 25 statements of counsel. I'll raise my hand and say, I am

00:22:28 1 included because Geo, in the reply brief, quotes me as
00:22:32 2 saying -- they don't quote me, they quote the article --
00:22:34 3 saying if Geo had to pay, and all these contractors had to
00:22:37 4 pay, the immigration detention system would collapse.

00:22:39 5 First of all, I am not quoted as saying that. Second of
00:22:42 6 all, it doesn't exactly matter. Geo, and we cite this in our
00:22:47 7 brief in a footnote, Geo's western regional supervisor told
00:22:51 8 the people of Washington that you could close the Tide Flats,
00:22:55 9 that it wouldn't affect federal policy, it wouldn't affect
00:22:56 10 the federal immigration policy. That's what he said.

00:22:59 11 What we are dealing with at this point is competing
00:23:02 12 factual statements that are not in the record. It would be
00:23:05 13 inappropriate for the Court to resolve those factual disputes
00:23:08 14 at this point.

00:23:09 15 I don't have a good idea where I am on time.

00:23:12 16 THE COURT: You are past due.

00:23:13 17 MR. FREE: I apologize. Unless the Court has
00:23:16 18 questions about the plaintiff's position.

00:23:17 19 THE COURT: I may have.

00:23:21 20 Thank you, Mr. Free. Ms. Chien.

00:23:30 21 MS. CHIEN: As the Court noted earlier, we filed a
00:23:38 22 motion to remand on November 8. We wanted to raise the point
00:23:42 23 that the existence of a private class action in federal court
00:23:45 24 doesn't create federal jurisdiction over the state claim.

00:23:49 25 That is Syngenta vs Henson.

00:23:52 1 It is not necessary to reach the motion to dismiss against
00:23:56 2 the State. However, if the Court is inclined to reach the
00:23:59 3 motion to dismiss, we would like to address the certain
00:24:01 4 issues, specifically what this case does and does not do.

00:24:05 5 The State seeks to enforce the state minimum wage law
00:24:09 6 against a private employer that does business in Washington,
00:24:12 7 just like it enforces the minimum wage law against any
00:24:16 8 private employer in Washington. The State does not seek to
00:24:19 9 challenge federal immigration authority to detain aliens, it
00:24:24 10 does not seek to challenge federal authority to contract with
00:24:27 11 Geo or detention services. The State does not seek to
00:24:31 12 challenge federal immigration policies, nor does the State
00:24:35 13 seek to challenge the congressional appropriations.

00:24:39 14 Geo, in the reply brief, repeatedly states that ICE cares
00:24:43 15 about the voluntary work program and the fact that detainees
00:24:46 16 work in order to defray costs, in order to eliminate or
00:24:51 17 minimize the tax burden on taxpayers. Unfortunately, that is
00:24:55 18 nowhere found in ICE's detention standards nor in the
00:24:58 19 contract between ICE and Geo. The contract between ICE and
00:25:01 20 Geo requires Geo to apply all applicable state -- comply with
00:25:07 21 all applicable state labor laws. If there is any ambiguity,
00:25:12 22 to apply the most stringent law between federal, state and
00:25:15 23 local laws. It also requires that Geo not use its detainee
00:25:22 24 workers to fulfill the responsibilities of the contractor.

00:25:27 25 The detention standards that defendants cite repeatedly,

00:25:34 1 the purpose of the detention standards is not to defray
00:25:37 2 costs. It is to provide opportunities for detainee workers
00:25:43 3 to earn money. The concerns about defraying cost and tax
00:25:46 4 burdens are nowhere found within ICE's detention standards or
00:25:51 5 the contract. Those are Geo's concerns alone. Geo's
00:25:55 6 concerns regarding costs, whether it is private or otherwise,
00:25:59 7 are Geo's alone, meaning all federal concerns or federal
00:26:02 8 issues that ostensibly create federal jurisdiction or
00:26:08 9 ostensibly create federal preemption, are non-existent.

00:26:12 10 I think Mr. Free addressed most of the preemption
00:26:15 11 arguments. I would like to spend some time addressing some
00:26:17 12 of the claims specifically made against the State.

00:26:21 13 If Your Honor has any other questions, I am happy to
00:26:24 14 answer those as well.

00:26:25 15 The first argument that defendants bring is whether or not
00:26:29 16 the State has authority or standing to bring this claim. It
00:26:34 17 would be incredible if the state attorney general's office
00:26:37 18 did not have authority to enforce its own laws. The AG --
00:26:42 19 the legislature enacted RCW 43.10 -- sorry -- enacted all of
00:26:49 20 the -- enacted the legislature statute, and enacted listing
00:26:53 21 all of the AG's powers, including the ability to bring cases
00:26:57 22 of public concern, matters of public concern in any court.
00:27:00 23 That was affirmed in City of Seattle vs McKenna, which is an
00:27:04 24 interesting case because City of Seattle vs McKenna basically
00:27:09 25 stands for the proposition that the AG's office can bring

00:27:12 1 these cases, as long as there is a matter of concern, and
 00:27:15 2 that is regardless of whether or not some portion of the
 00:27:18 3 population disagrees with the lawsuit at hand.

00:27:22 4 THE COURT: Ms. Chien, how does the enforcement of
 00:27:32 5 the Minimum Wage Act usually proceed against an employer who
 00:27:36 6 is not abiding by it?

00:27:38 7 MS. CHIEN: The Department of Labor & Industries is
 00:27:42 8 the primary agency that enforces the Minimum Wage Act. That
 00:27:45 9 doesn't preclude the attorney general from also enforcing the
 00:27:49 10 Minimum Wage Act. Nothing within -- nothing that is cited by
 00:27:52 11 defendants that would preclude our enforcement.

00:27:56 12 I also mention in their reply defendants raise the
 00:28:01 13 argument that City of Seatte vs McKenna requires statutory or
 00:28:06 14 common law -- a cognizable common law claim.

00:28:10 15 We have both. The Minimum Wage Act clearly prohibits the
 00:28:13 16 conduct that Geo is engaged in, and unjust enrichment is
 00:28:18 17 cognizable in a common law claim.

00:28:21 18 The only other case the defendants rely on in the reply is
 00:28:27 19 Confederated Tribes, which held that a tribe cannot -- did
 00:28:29 20 not have authority to bring a lawsuit because the law they
 00:28:33 21 were challenging affected only a single tribal member.

00:28:37 22 That is completely different from the case we have here.
 00:28:40 23 The Minimum Wage Act was enacted purposely because the impact
 00:28:44 24 of not following minimum wage is a broad impact. It
 00:28:49 25 discourages people from hiring people within the Tacoma

00:28:53 1 community. It hurts the health and well-being of the workers
00:28:58 2 that are paid a substandard minimum wage. This has broader
00:29:02 3 impact than just against one individual member of our -- of
00:29:05 4 the Washington community. This has -- this impacts
00:29:09 5 thousands.

00:29:10 6 Defendant doesn't reply to those arguments. Those are --
00:29:13 7 we wanted to make sure that was on the record.

00:29:17 8 Regarding the failure to state a claim -- I don't know if
00:29:21 9 you have any other questions around standing or authority
00:29:24 10 that I can address. I think those are well covered. I can
00:29:27 11 move on to failure to state a claim.

00:29:29 12 THE COURT: Yes.

00:29:30 13 MS. CHIEN: As is clear, as Geo even acknowledges,
00:29:34 14 our Minimum Wage Act clearly covers the detainee workers.
00:29:39 15 There is no exemption for detainees held by private companies
00:29:43 16 at the Tide Flats. The exemption -- our Minimum Wage Act is
00:29:47 17 to be liberally construed. In this way, our Minimum Wage Act
00:29:52 18 differs significantly from FLSA, which is the Federal Labor
00:29:56 19 Standards Act. Differs in two significant ways. Number one,
00:29:59 20 the purpose of the Minimum Wage Act is much broader than the
00:30:02 21 Fair Labor Standards Act. We care about the employment
00:30:05 22 opportunities within our community, not just the health and
00:30:08 23 well-being of the detainee workers.

00:30:11 24 Second, FLSA makes no mention regarding detainee --
00:30:16 25 whether or not the state prisoners or anybody is exempted.

00:30:21 1 Here, under the Minimum Wage Act, we have an explicitly
00:30:25 2 stated exemption for those detainees held in state
00:30:30 3 facilities, meaning the legislature contemplated detention
00:30:35 4 facilities, decided to exempt state facilities and chose not
00:30:39 5 to exempt the Tide Flats facility right here.

00:30:43 6 The only argument Geo makes to oppose that argument is
00:30:50 7 that it would only be unreasonable if it didn't also apply to
00:30:55 8 their facility in the Tide Flats. That amounts to nothing
00:30:59 9 but a disagreement with the way our state law is crafted.

00:31:02 10 We cannot assume the legislature would have exempted the
00:31:06 11 Northwest Detention Center. I can't imagine the legislature
00:31:10 12 would do so now.

00:31:12 13 Regarding FLSA, our Minimum Wage Act is to be liberally
00:31:23 14 construed whereas FLSA is persuasive authority, it is not
00:31:28 15 binding. Where it is different, it should be treated as
00:31:32 16 different, and the Minimum Wage Act in our case is different.

00:31:35 17 I would like to move -- if the Judge doesn't have any
00:31:39 18 other questions regarding the Minimum Wage Act, I'll move on
00:31:41 19 to the unjust enrichment provision.

00:31:45 20 Unjust enrichment is different from our Minimum Wage Act
00:31:49 21 claim. We are seeking to discourage the ill-gotten gains,
00:31:55 22 profits made by Geo for profits received for failure to pay
00:31:59 23 the fair wage that they would have had to pay Tacoma workers
00:32:03 24 in the community or otherwise to operate its facility. The
00:32:08 25 only argument that detainees make is that somehow the state

00:32:14 1 could be bound by -- is prevented from bringing the claim due
 00:32:18 2 to unclean hand and laches. Both are equitable defenses.
 00:32:24 3 The burden lies with defendant to prove them. In this case,
 00:32:27 4 defendant has done neither.

00:32:31 5 Regarding unclean hands, the fact the government has
 00:32:37 6 exempted itself under its own state laws and not exempted
 00:32:43 7 Geo's facility doesn't render our hands unclean. You can
 00:32:48 8 look to U.S. vs Phillip Morris, which was the government
 00:32:51 9 challenging Phillip Morris' failure to disclose all the risk
 00:32:55 10 associated with tobacco usage, and Phillip Morris came back
 00:32:59 11 and said, yeah, government, you knew there was also problems
 00:33:02 12 with tobacco usage and you didn't say anything either. The
 00:33:08 13 court in the District of Colombia held that is not an unclean
 00:33:11 14 hands defense as held against the government, whereas the
 00:33:15 15 claims against the government did not suggest the government
 00:33:18 16 had engaged in any fraud or misrepresentation. Nor is the
 00:33:22 17 case here. Us exempting the state detainees from the Minimum
 00:33:28 18 Wage Act is not fraud or misrepresentation or any sort of
 00:33:31 19 unlawful conduct.

00:33:33 20 Regarding laches. Again, it is the defendant's burden to
 00:33:39 21 prove laches applies. Here, it is unclear from the briefing
 00:33:44 22 whether or not Geo -- when Geo believes that laches would
 00:33:50 23 apply. It is unclear when was the delay. They failed to do
 00:33:58 24 so. Any delay in bringing the unjust enrichment claim
 00:34:04 25 doesn't prevent them -- does not constitute prejudice,

00:34:09 1 another requirement of laches. I would refer the Court to In
 00:34:13 2 Re Marriage of Hunter where it says, any delay for legal
 00:34:15 3 obligation that you were supposed to have done years ago
 00:34:18 4 cannot count as prejudice.

00:34:21 5 In sum, we believe the State has clear authority under
 00:34:27 6 City of Seattle vs McKenna to bring this case. This is
 00:34:32 7 bear -- there are several courts that have deemed that
 00:34:36 8 federal contractors, just by the fact they are federal
 00:34:39 9 contractors, does not get out of their obligation under state
 00:34:44 10 law. I would only add, regarding on the preemption issue you
 00:34:48 11 mentioned, that IRCA -- IRCA does not preempt our state laws.
 00:34:55 12 Geo is completely capable of complying with both our state
 00:35:00 13 law as well as IRCA. Does so every day with regard to the
 00:35:05 14 security employees, and they check if their employees are
 00:35:10 15 work authorized and they pay them minimum wage. They could
 00:35:13 16 do the same here. There is no preemption between IRCA and
 00:35:21 17 state law.

00:35:22 18 The only other -- the only other thing -- the only other
 00:35:31 19 item I would add is in defendant's reply on the conflict
 00:35:36 20 preemption issue that Mr. Free addressed in Salas vs Sierra
 00:35:40 21 Chemical, that case stands for the proposition that IRCA does
 00:35:43 22 not preempt wage worker protection laws. It may affect the
 00:35:49 23 remedy. For example, in that case that said the remedy was
 00:35:54 24 limited in Salas, the worker wouldn't be able to get pay
 00:35:58 25 after their unlawful determination, after it was discovered

00:36:02 1 they were unauthorized. That is different from what we have
00:36:07 2 here. We are talking about people detaining workers who have
00:36:10 3 worked the hours, you know, worked their hours and benefitted
00:36:16 4 Geo, who are not getting paid. It is not for work not
00:36:21 5 performed, not for wages for an unlawful determination. That
00:36:25 6 is something that is completely separate.

00:36:27 7 In short, we say the authority over this Minimum Wage Act
00:36:31 8 claim preemption does not apply. This case is not about
00:36:35 9 federal laws. It is not about federal issues. Just because
00:36:37 10 of the fact that Geo is a federal contractor doesn't deem it
00:36:43 11 so.

00:36:48 12 THE COURT: Thank you, Ms. Chien.

00:36:51 13 Ms. Mell.

00:36:55 14 MS. MELL: Thank you, Your Honor. Joan Mell
00:37:00 15 appearing on behalf of the Geo Corps. Geo Corps is here to
00:37:03 16 ask the Court to dismiss these cases by the state and
00:37:06 17 Mr. Chen as a matter of law for failure to state a claim.
00:37:10 18 There are other preemption issues that I will get into in
00:37:14 19 further detail as we go along.

00:37:15 20 You asked a very specific question. I have Geo's answer
00:37:18 21 to your question. Does this Court need to be bifurcating
00:37:22 22 those people who can work and try to ascertain a fact pattern
00:37:25 23 of who has eligibility for competitive work and those who
00:37:29 24 don't? The answer is clearly no.

00:37:32 25 That answer needs to come from ICE. ICE needs to engage

00:37:37 1 in that discussion. That is a public policy discussion
00:37:39 2 because this is detention. This is not a competitive work
00:37:44 3 environment. The way we address people who can work
00:37:47 4 competitively in a detention or restraint type scenario, we
00:37:55 5 develop work release programs. We develop least restrictive
00:37:59 6 alternatives. This state has a long history and a long
00:38:02 7 public record of public policy debate about who is eligible,
00:38:08 8 under what terms, what conditions, where they are allowed to
00:38:11 9 be released into the community, how they are supervised, how
00:38:14 10 those wages earned are handled and deducted and contributed
00:38:18 11 back to the state to cover the cost of their care and
00:38:21 12 supervision.

00:38:22 13 That is not a determination that this Court should engage
00:38:25 14 in. That is not a discussion that this Court should get into
00:38:29 15 because that is a policy discussion for ICE.

00:38:33 16 Once you have the detention overlay, we are not in the
00:38:37 17 Minimum Wage Act realm or universe. There is no policy basis
00:38:41 18 to merge the two. There is a preemption issue because the
00:38:46 19 whole argument, you have never heard either side mention the
00:38:49 20 two key discerning factors, detention and immigration. This
00:38:55 21 Court has limited discretionary authority over immigration
00:38:59 22 cases. That is what the court, who's most closely decided
00:39:03 23 one of those issues, decided in Alvarado.

00:39:05 24 Furthermore, the issue of whether or not the Minimum Wage
00:39:11 25 Act even applies, the Minimum Wage Act, you first have to get

00:39:15 1 to an employment contract. We don't have that here. Geo --
00:39:20 2 THE COURT: Wait a minute. Isn't that a fact issue
00:39:23 3 that we can't decide in this motion as to whether these
00:39:28 4 people are employees?

00:39:31 5 MS. MELL: That is not a fact issue. There is no
00:39:32 6 disputed fact about who contracts for the voluntary work
00:39:36 7 program. There is no disputed fact over what is paid. There
00:39:41 8 is no disputed fact over ICE policy with regard to the need
00:39:45 9 for a voluntary work program.

00:39:48 10 THE COURT: There are a lot of disputed facts about
00:39:51 11 who supervised them, how they are chosen, how much they are
00:39:54 12 paid, what they do, what they can't do. Seems to me, they
00:40:04 13 have many of the hallmarks of employment.

00:40:09 14 MS. MELL: In detention.

00:40:11 15 THE COURT: In detention.

00:40:12 16 MS. MELL: That is not competitive work and that is
00:40:15 17 not minimum wage work. Those policies cannot converge. If
00:40:19 18 they do converge, then the policy discussion is not as to
00:40:24 19 application of the Minimum Wage Act. It is an application as
00:40:26 20 to what is the scope of the way we handle individuals who are
00:40:31 21 detained when they have an immigration status.

00:40:34 22 Now, the IRCA issue that is directly on point, if you look
00:40:38 23 at the house provisions as to what IRCA intended, congress
00:40:45 24 found that work was the magnet for illegal immigration. What
00:40:51 25 the State and what Mr. Chen are actually proposing is that

00:40:57 1 this Court, by judicial edict, make Geo the magnet. That is
 00:41:02 2 a universe that cannot be contemplated in the judicial arena
 00:41:08 3 because this Court can't possibly address all the
 00:41:10 4 ramifications of creating an employment relationship inside a
 00:41:16 5 detention center when the detention is necessary.

00:41:19 6 THE COURT: I would agree, the Court can't create an
 00:41:24 7 employment relationship. The question is going to be, if the
 00:41:28 8 case goes on, to whether these people were employees.

00:41:35 9 MS. MELL: We clearly know they aren't employees for
 00:41:39 10 purposes of state law. The Minimum Wage Act has an express
 00:41:42 11 preemption which is far more sophisticated than any local
 00:41:46 12 jurisdictional discussion about state law in any of the cases
 00:41:51 13 that have been decided. Not only that, the beauty of this,
 00:41:55 14 the astounding thing is we have a state alleging they have
 00:41:58 15 to, allegedly under the McKenna case, come up with some
 00:42:03 16 authority to enforce the Minimum Wage Act, when it is not
 00:42:06 17 enforceable by the attorney general. There is a very
 00:42:09 18 stringent statutory scheme and regulatory scheme as to how
 00:42:12 19 L&I enforces the Minimum Wage Act.

00:42:15 20 If you are going to extend that, the State can come in
 00:42:19 21 with the AG and say, oh, well, there have been no complaints,
 00:42:22 22 L&I hasn't taken a position on this. Actually, L&I has taken
 00:42:28 23 a position on this. L&I has a policy statement that says
 00:42:31 24 private contractors doing work, having people work in a
 00:42:34 25 detention center, is not minimum wage work. There is an

00:42:37 1 express exclusion, so we don't even get there.

00:42:40 2 THE COURT: I thought the exclusion applied to state
00:42:44 3 detainees, not federal.

00:42:47 4 MS. MELL: The exclusion doesn't have the word
00:42:49 5 "federal" in it because who down in the legislative arena --
00:42:53 6 being a staff person, I would never put the word "federal" in
00:42:57 7 a one-line exclusion in the Minimum Wage Act. They are not
00:42:59 8 in the business of telling the feds what to do. They are
00:43:03 9 staying in their own lane. They are addressing their policy
00:43:03 10 concerns because they know at the federal level, ICE,
00:43:07 11 congress, they are going to have the same policy discussions.
00:43:10 12 They are going to decide whether or not they want work
00:43:14 13 economic benefit programs. They are going to decide whether
00:43:17 14 they have least restrictive alternatives. They are going to
00:43:20 15 decide whether or not these immigrants are going to be
00:43:22 16 attracted to come to the United States because there is
00:43:25 17 minimum wage jobs in detention.

00:43:27 18 You can't take all the criteria for what it means to be an
00:43:31 19 employee out of the Geo contract. By the way, Your Honor, I
00:43:35 20 did file a much more extensive contract.

00:43:37 21 THE COURT: I know. I saw it.

00:43:40 22 MS. MELL: We concede the one that was filed by the
00:43:43 23 State has the relevant, pertinent parts so we can refer to
00:43:47 24 that.

00:43:47 25 The contract is much broader in terms of what it means,

00:43:52 1 what qualifies, who qualifies to be an employee. You can't
00:43:55 2 pick and choose and say that because there is a dollar a day
00:44:01 3 floor rather than a ceiling, that gives broad discretion to
00:44:05 4 redefine the whole relationship. There is no at will
00:44:08 5 negotiations. There is no contract negotiations. That is
00:44:11 6 not in dispute. That is not a factual issue. It is not
00:44:16 7 minimum wage work. It is not under state law, and it is not
00:44:18 8 here.

00:44:20 9 THE COURT: What if all of the detainees refused to
00:44:25 10 do any work?

00:44:27 11 MS. MELL: Good. They can sit there. It is a
00:44:30 12 voluntary work program. We cannot, per contract, compel them
00:44:34 13 to work. There is no compliance requirement.

00:44:37 14 That brings up a good point. What if they do? Isn't that
00:44:41 15 a policy discussion for ICE? Isn't that a detention issue in
00:44:45 16 terms of who gets to sit idle and who doesn't get to sit
00:44:50 17 idle? That is addressed in the PMDS -- or whatever. I am
00:44:55 18 terrible at the acronym. I can't seem to get it in my head.
00:44:58 19 You know what I mean. I can put it up here on the board.

00:45:01 20 There is not just factors of pay. There is factors of
00:45:03 21 what is the appropriate balance and relationship between
00:45:07 22 detainees and people who are employees, what do those
00:45:12 23 requirements need to be, and how does that relationship work.
00:45:15 24 That is not for a judicial determination under the Minimum
00:45:17 25 Wage Act. That has never been applied in any universe to a

00:45:22 1 detention setting.

00:45:26 2 Let me show you what we are talking about locally. Here
00:45:29 3 is what we are talking about. The argument here is simply
00:45:36 4 stated. This is minimum wage work, when we know this isn't.
00:45:40 5 That is the Pierce County Jail right up the street. The TNT
00:45:44 6 did a wonderful program talking to these trustees to find out
00:45:47 7 how they valued their opportunities to engage in collective
00:45:53 8 work, community work to make the inside of sitting in the
00:45:57 9 Pierce County Jail less boring, less stressful, better food,
00:46:01 10 better environment, keep your living spaces clean.

00:46:06 11 This is not work where we are asking the detainees to come
00:46:10 12 on the unsecure side and pick up the lunch items for the ICE
00:46:15 13 security people who have thrown out their garbage.

00:46:19 14 THE COURT: Well, you know, you are getting into what
00:46:22 15 these people are actually doing. I don't think that is the
00:46:25 16 issue here. Seems to me that if I am going to rule on issues
00:46:33 17 of preemption, that presupposes, for argument's sake, that
00:46:38 18 these people can be proven to be employees. Then, assuming
00:46:44 19 that, is their wage rate preempted?

00:46:51 20 MS. MELL: I am not sure I am following your logic.
00:46:54 21 Are you saying in order to reach a federal preemption
00:46:56 22 discussion, you have to decide as a matter of law that they
00:46:59 23 can be employed? Or you don't have to decide that, you just
00:47:02 24 assume.

00:47:03 25 THE COURT: I don't have to decide that. I think I

00:47:05 1 have to assume that they are employees. If they are not
00:47:10 2 employees, then there is nothing to preempt.

00:47:15 3 MS. MELL: Okay. All right. Focus on preemption, is
00:47:17 4 what you are telling me to do. All right.

00:47:20 5 Talking about preemption. How on earth can you have a
00:47:26 6 congressional house report this long discussing in detail how
00:47:33 7 it will, de -- how the employment standards are affecting
00:47:40 8 immigration, illegal immigrants, people coming to the
00:47:45 9 United States and say that it is not a preemption issue? You
00:47:50 10 can't narrow it down to the dollar a day because that is not
00:47:54 11 the nature of the relationship. It is not just a wage issue.
00:47:58 12 It is a, who are these people and are they entitled to be
00:48:02 13 working in the United States. They were saying no. Why
00:48:06 14 would you create it as a matter of public policy within a
00:48:09 15 detention facility?

00:48:11 16 The whole idea that the Minimum Wage Act is not punitive
00:48:18 17 defies the Minimum Wage Act. I went back in the legislative
00:48:22 18 history to actually look at the Minimum Wage Act. They are
00:48:25 19 saying, well, back wages aren't punitive. Well, back wages,
00:48:30 20 in combination with the calculation of attorney's fees and
00:48:33 21 costs and those other consequences, are, indeed, punitive.
00:48:38 22 We are operating in the United States, in Washington State,
00:48:41 23 under an American rule. When you have an attorney's fee
00:48:45 24 shifting provision that is identified in the statute, you are
00:48:48 25 necessarily saying you have done something wrong. In those

00:48:52 1 cases where they are saying there is no preemption under
 00:48:55 2 IRCA, they are worker compensation cases which is a no-fault
 00:49:01 3 system without American rule, statutory fee shifting
 00:49:03 4 provisions, they are personal injury cases where they are
 00:49:08 5 deciding that they need to -- you know, that's not a fee
 00:49:12 6 shifting either. You don't have an attorney fee award in a
 00:49:14 7 personal injury case. You are also dealing with not
 00:49:18 8 detention. There is no in-detention IRCA application ever
 00:49:24 9 that has been considered because it is simply not a
 00:49:27 10 competitive work environment.

00:49:29 11 There is no need -- the policy objective you see the
 00:49:31 12 courts repeating in those cases, what you see them saying is,
 00:49:36 13 we are not going to let an employer take advantage of illegal
 00:49:39 14 immigrants regardless of -- well, actually, there is big
 00:49:44 15 discussion in some of those cases about, well, let's see who
 00:49:47 16 is the real bad actor here and compare who is the bad actor.
 00:49:51 17 Did they get employed because they presented illegal
 00:49:53 18 documentation so that is their fault, they don't get any?
 00:49:56 19 That becomes a very unusual fact specific way to analyze
 00:50:02 20 preemption, which I would recommend against.

00:50:05 21 In this instance, I would urge the Court to focus on the
 00:50:09 22 fact that you have the IRCA position of not wanting to employ
 00:50:16 23 immigrants illegally, then you have the added overlay that
 00:50:20 24 all detention follows federal standards for correction, ACA
 00:50:27 25 standard, PBNDS standards, all those things are there because

00:50:32 1 there is a very careful balance that has to be maintained
00:50:35 2 within the detention context. Yes, it is preempted for those
00:50:40 3 reasons.

00:50:47 4 Other preemption. I don't know. What other preemption
00:50:51 5 issue is the Court struggling with? I don't see how you can
00:50:53 6 possibly get there. Even for a population that arguably can
00:50:57 7 work, not in detention, not in detention in the free
00:51:03 8 negotiating Minimum Wage Act universe in what the Minimum
00:51:07 9 Wage Act is intended to address. You see like in the Hale
00:51:11 10 case, they kind of line up the FLSA standards and policy
00:51:15 11 objectives with the objectives of work, and they do this
00:51:23 12 comparative analysis. If you look at the Minimum Wage Act,
00:51:27 13 the two standards in the Minimum Wage Act that I -- the
00:51:31 14 Supreme Court certainly doesn't need to help you here because
00:51:34 15 the Minimum Wage Act has said what its purpose is. That is
00:51:39 16 to maintain minimum standards of employment -- I am looking
00:51:45 17 at RCW 49.46.005(1) -- and to encourage employment
00:51:51 18 opportunities within the state.

00:51:53 19 Well, that necessarily means that you have employment
00:51:59 20 opportunities. Employment opportunities in detention, in the
00:52:03 21 context of immigrants who may have documented or undocumented
00:52:09 22 status, whether or not they are able to work, those decisions
00:52:13 23 get made by ICE on the forefront, but more so on a case by
00:52:17 24 case, individualized basis. There are judges down there
00:52:20 25 administratively making these determinations. If they are

00:52:24 1 authorized to work, Geo can't be in the position of becoming
00:52:29 2 their employer in that sense where they then are the one who
00:52:34 3 has to affirm that they are performing at an acceptable level
00:52:38 4 that justifies the basis for them prevailing in their removal
00:52:43 5 action. It creates a whole plethora of issues that conflict
00:52:47 6 with maintaining order in the context of corrections that
00:52:52 7 don't exist where a contractor, for instance, in the
00:52:56 8 California case, where a contractor is not paying prevailing
00:53:02 9 wages to a worker whom he hires on the outside at a cut-rate.
00:53:06 10 That is not what we are dealing with.

00:53:08 11 I have my binders here; I could go through and flop in
00:53:12 12 front of the Court every regulatory piece of information that
00:53:17 13 controls this relationship. It is abundant. It is abundant
00:53:21 14 because it is immigration. It is abundant because it is
00:53:23 15 detention. You can't take those two things out of the
00:53:26 16 universe and judicially set the whole world on fire creating
00:53:30 17 Geo as the magnet for employment. It is a bad policy
00:53:33 18 decision. It is bad policy. It is policy. It needs to be a
00:53:37 19 policy at the federal level, not here.

00:53:41 20 The whole reason the State doesn't include the word
00:53:44 21 "federal" is because they don't engage in federal policy
00:53:46 22 discussions. They are very careful not to step on one
00:53:50 23 another's toes. They stay in their lane. The feds stay in
00:53:54 24 their lane. It is as simple as that.

00:53:59 25 THE COURT: Question: What does the contract mean

00:54:05 1 when it includes constraints the contractor is expected to
00:54:12 2 perform, follow, and that includes applicable federal, state
00:54:20 3 and local labor laws and codes?

00:54:23 4 MS. MELL: With -- are you saying the labor laws and
00:54:28 5 codes are part of state law? Or are you asking me about
00:54:36 6 applicable?

00:54:36 7 THE COURT: I am talking about your contract.

00:54:39 8 MS. MELL: The contract ensures that Geo is a good
00:54:43 9 government citizen, and to the extent laws locally and
00:54:49 10 state-wide apply to Geo, Geo will be responsive to the needs
00:54:53 11 of the local community. For instance, on the zoning issues,
00:54:57 12 I am representing Geo on a discussion about whether or not
00:55:01 13 they should be subject to Department of Corrections -- well,
00:55:06 14 correction zoning standards, whether or not they are an
00:55:10 15 essential public facility. That whole private/public debate
00:55:13 16 went by the wayside. The issue of privatization is a
00:55:16 17 non-issue. There is no distinction there. It becomes sort
00:55:19 18 of one of these how much is too much, does it really apply.
00:55:24 19 Geo, Geo, honestly in the years I have been working for them,
00:55:28 20 they try to be good citizens and work and negotiate with
00:55:31 21 local government on those things that seem amenable and seem
00:55:34 22 to not --

00:55:36 23 THE COURT: Do they follow state law for their
00:55:39 24 employees?

00:55:40 25 MS. MELL: That is an interesting question. We have

00:55:42 1 not had to. For instance, is the question: Does Geo have to
00:55:46 2 pay state employees subject to the Minimum Wage Act? I would
00:55:50 3 still say no, not necessarily. The laws that Geo follows are
00:55:56 4 the contract. If you look in the contract, even the
00:55:59 5 employees are highly regulated in their pay rate. For the
00:56:03 6 most part, those pay rates exceed the minimum wage, so I
00:56:08 7 think that is why it has never been an issue.

00:56:09 8 THE COURT: Not all of them.

00:56:11 9 MS. MELL: They are subject to collective bargaining.
00:56:16 10 In the context -- you know the provision in the congressional
00:56:19 11 reports where they discuss there is not supposed -- IRCA
00:56:22 12 provisions were not intended to supercede labor regulations.
00:56:27 13 If you look at that whole paragraph, it actually concerns and
00:56:31 14 discusses the NLRB. My read of labor laws in that context is
00:56:37 15 actually the collective bargaining rights, and those things
00:56:40 16 that fit within civil service and collective bargaining as
00:56:44 17 opposed to pure minimum wage laws. I don't think -- I think
00:56:48 18 it is a case by case basis. Certainly here, where there is
00:56:51 19 an express exclusion under the state law for private
00:56:56 20 contractors running work programs for people in detention,
00:57:02 21 and the people have spoken, they want an offset. They have
00:57:07 22 found it to be in the State's interest to have offsets and to
00:57:11 23 have work in detention not at minimum wage.

00:57:16 24 What we do know, it doesn't matter if it is a dollar a day
00:57:19 25 or five dollars a day or the minimum wage that ICE has

00:57:22 1 expressed. ICE has expressed a dollar. They didn't say that
00:57:27 2 it has to be minimum wage, and they would have this
00:57:31 3 discussion, and advocates have been doing a very good job
00:57:34 4 with regard to minimum wage programs. This state has known
00:57:37 5 for years. They have been down there. I talk to them in
00:57:40 6 various contexts as to whether or not we are compliant. They
00:57:46 7 know.

00:58:01 8 THE COURT: Let me look here at some of my notes.
00:58:04 9 You can be seated. I may have some questions here for all of
00:58:09 10 you.

00:58:10 11 MS. MELL: Thank you, Your Honor.

00:58:57 12 THE COURT: The question in my mind here is this -- I
00:59:05 13 have trouble with the acronym, too.

00:59:14 14 MR. FREE: PBNDS?

00:59:16 15 THE COURT: Yes. Apparently, the secretary of ICE
00:59:30 16 adopted those standards. Most of them, I gather, found their
00:59:38 17 way into the contract. Those are standards. I gather they
00:59:50 18 are not requirements.

00:59:54 19 MR. FREE: They are not. They are regulatory agency
00:59:59 20 guidelines that did not withstand or go through the process
01:00:03 21 of notice and comment or rule-making. They set forth
01:00:06 22 requirements that have been incorporated into Geo's contract.
01:00:11 23 Geo has agreed to abide by them. There are no penalties for
01:00:16 24 not abiding, at least not real ones.

01:00:18 25 THE COURT: Ms. Mell, do you agree with that?

01:00:21 1 MS. MELL: Agree with the fact that the standards are
 01:00:25 2 not binding? No, I think ICE and Geo take those standards
 01:00:30 3 very seriously, and the actual nature of the --

01:00:34 4 THE COURT: Well, I agree with that. They are mostly
 01:00:39 5 in the contract, so they take them seriously. My question is
 01:00:44 6 whether there is some authority in those detention standards
 01:00:51 7 that has to be followed. Is there any requirement, any
 01:00:55 8 regulation or rule or law or anything, or are they just the
 01:01:01 9 wish list of the director?

01:01:04 10 MS. MELL: I think they are the policy position,
 01:01:07 11 express policy position just like the ESA bulletin from the
 01:01:12 12 Department of Labor & Industries that the private contractors
 01:01:16 13 providing work, having operating work programs don't have to
 01:01:25 14 pay minimum wages, I think it would be equal to the ESA
 01:01:28 15 bulletin.

01:01:28 16 THE COURT: What are you referring to?

01:01:30 17 MS. MELL: Let me give you -- I am looking at a
 01:01:48 18 document. I am drawing a parallel between state agency
 01:01:55 19 conduct and federal agency conduct so the PBNSD policy
 01:02:00 20 provisions are the expression of the agency as to how they
 01:02:05 21 want things to operate. They will expect that they operate
 01:02:07 22 in compliance with those policy expressions. Similar --

01:02:12 23 THE COURT: They are not binding?

01:02:15 24 MS. MELL: I am not sure what you mean by "not
 01:02:17 25 binding."

01:02:17 1 THE COURT: I mean a rule or regulation. Can
01:02:20 2 somebody look at this, somebody wants to compete with Geo,
01:02:27 3 they want to not follow a lot of those standards. They make
01:02:35 4 a different proposal to the government. The government can
01:02:38 5 take them up on it. They don't have to follow these
01:02:41 6 standards.

01:02:42 7 MS. MELL: They could have the policy discussion,
01:02:44 8 absolutely. They could change policy. They could choose --

01:02:47 9 THE COURT: Is this the official United States of
01:02:52 10 America government policy or is this the wish list of the
01:02:59 11 director of ICE?

01:03:03 12 MS. MELL: I think you give too much discretion to
01:03:07 13 the director of ICE to have a wish list and treat it as
01:03:13 14 entirely a wish list as opposed to something that he would
01:03:16 15 enforce. Administratively, I think the ICE director would
01:03:23 16 say that if you are out of compliance with each, you are
01:03:27 17 violating the rules of the way we want things to operate,
01:03:30 18 just like if Geo violates an ESA, it would be a violation of
01:03:37 19 L&I's policies. They would choose to enforce it. We could
01:03:41 20 always come to court and debate that certainly.

01:03:44 21 MR. FREE: Actually, Your Honor --

01:03:45 22 THE COURT: In the *New York Times*, April of 2017,
01:03:50 23 there was an article that indicated, I quote, "According to
01:03:59 24 two Homeland Security officials who had knowledge of the
01:04:03 25 plans, but declined to be identified because they were not

01:04:06 1 authorized to speak publicly, the new jail contract will
01:04:11 2 contain a far less detailed set of regulations."

01:04:16 3 In other words, the administration apparently is thinking
01:04:20 4 about changing these.

01:04:22 5 MS. MELL: The administration was thinking about
01:04:24 6 changing things. That's why you see terms where ICE decided
01:04:30 7 to express the dollar a day. They didn't want to be an
01:04:34 8 agency saying they were controlling exactly the amount. They
01:04:38 9 wanted the discussions to continue as a policy matter as to
01:04:41 10 what kind of programs are we going to have, is everything
01:04:44 11 going to be dollar a day work? Are we going to have
01:04:47 12 competitive economic programs? Are we going to have least
01:04:51 13 restrictive work alternatives.

01:04:52 14 THE COURT: Who has the authority to set the
01:04:55 15 standards for the inmates?

01:04:58 16 MR. FREE: Do you want to hear from Ms. Mell?

01:05:02 17 THE COURT: I don't care. I want to hear from any of
01:05:04 18 you that want to answer.

01:05:05 19 MR. FREE: I can just tell you, the government says
01:05:10 20 that these standards are unenforceable at law. You can't
01:05:14 21 take them to court and enforce these standards. As a matter
01:05:18 22 of administrative law, they are going to get zero deference.
01:05:22 23 These are federal administrative standards. I am not sure
01:05:25 24 what Ms. Mell put on the screen. These are not uniform
01:05:28 25 government enforceable standards. In fact, at contracting

01:05:32 1 facilities across the country, they follow different
01:05:35 2 versions, some intergovernmental services agreement
01:05:38 3 facilities don't follow the 2011 or the 2016 performance base
01:05:45 4 national detention center standards. Some services
01:05:48 5 processing centers don't. It is a patchwork across the
01:05:51 6 country.

01:05:52 7 THE COURT: Well, if that's the only place the dollar
01:05:55 8 a day minimum appears, where does the authority for a dollar
01:06:02 9 a day come from, other than the agreement?

01:06:07 10 MS. MELL: Congressional appropriation that said it
01:06:10 11 would be a dollar a day.

01:06:11 12 THE COURT: Well, the appropriation didn't. The
01:06:15 13 contract said they would be reimbursed a dollar a day.
01:06:21 14 But --

01:06:22 15 MS. MELL: It did say in the '70s that would be the
01:06:24 16 amount. Period. What has changed is there hasn't been a
01:06:28 17 subsequent appropriation with the same limitation since then
01:06:32 18 so then it is up in the air. If it is up in the air,
01:06:35 19 Your Honor, that doesn't give this Court the invitation to go
01:06:40 20 in and administer a state law Minimum Wage Act to decide that
01:06:44 21 that is the standard applicable to a detention facility
01:06:49 22 housing illegal --

01:06:50 23 THE COURT: I understand your position, I think.

01:06:52 24 MR. FREE: They foreclosed this argument. They've
01:06:57 25 abandoned the argument that this is regulatorily preempted.

01:07:00 1 Now we are justifying the statute. Yes, the '70s was the
 01:07:03 2 last time congress set a number. Under that context, there
 01:07:09 3 is not the clear congressional purpose to displace the
 01:07:13 4 Minimum Wage Act that you need in order to find preemption.
 01:07:17 5 So then what you are left with is these factual
 01:07:21 6 representations that have been made to the Court about what
 01:07:23 7 it would actually mean in practice and what the policy
 01:07:27 8 implications would be.

01:07:28 9 My friend has asserted there is going to be a magnet for
 01:07:33 10 people en masse to cross the border and turn themselves in so
 01:07:37 11 they can work for minimum wage in Washington State. This is
 01:07:41 12 her assertion. She's asserted there is no contract. In
 01:07:45 13 discovery, Your Honor, we will adduce the contract that
 01:07:47 14 workers work under. This is a 12(b)(6) motion. There are
 01:07:51 15 fact issues here that do not prevent us from plausibly
 01:07:56 16 pleading violation of the Minimum Wage Act.

01:07:59 17 With respect to the photo I have asked my friend to put up
 01:08:02 18 on the screen and her point is it is detainee labor.
 01:08:06 19 Your Honor, this is the key insight of Hale. The key insight
 01:08:11 20 of Hale and cases that follow-up on Hale in the Ninth
 01:08:15 21 Circuit, not Alvarado from the Fifth, the key insight is who
 01:08:19 22 does the detainee labor belong to, whose is it?

01:08:23 23 Hale says if it belongs to the detention facility, you
 01:08:26 24 don't use the Bonnette test that we use in the Ninth Circuit.
 01:08:30 25 Follow along cases, Cooper and Baker and Castle, analyze the

01:08:35 1 detainees' labor under that framework.

01:08:39 2 Since 1896, the Supreme Court has made clear that

01:08:42 3 detainees detained for immigration cannot be forced to work.

01:08:47 4 Today, Geo has said, you can't force them to work.

01:08:50 5 Incidentally, this will be adduced in discovery, you can be

01:08:54 6 put in solitary for inciting a labor stoppage, but since Wong

01:09:01 7 Wing it has been clear, the black letter U.S. Supreme Court

01:09:04 8 law, that detainees cannot be forced to work. What that

01:09:07 9 means is their labor belongs to them. Under Ninth Circuit

01:09:12 10 case law with cases like the Gonzalez case, Gonzalez vs

01:09:17 11 Mayberg in the Central District of California, it is

01:09:20 12 recognized in Baker vs McNeil and Castle, if the labor

01:09:25 13 belongs to the detainee, you analyze it under the traditional

01:09:31 14 FLSA test. Geo does not address this issue.

01:09:34 15 THE COURT: All right. I am trying to ask some
01:09:37 16 questions here.

01:10:21 17 I assume these detainees are paid cash money without
01:10:28 18 withholding; is that correct?

01:10:31 19 MS. MELL: They are not paid cash. There is money
01:10:34 20 placed on their account without withholding for the cost of
01:10:37 21 their care.

01:10:39 22 THE COURT: Without withholding for income tax?

01:10:41 23 MS. MELL: Correct.

01:10:43 24 THE COURT: Without withholding for Social Security?

01:10:45 25 MS. MELL: Correct.

01:11:12 1 THE COURT: All right. I had a lot of questions,
01:11:16 2 most of which have been answered. Do you have further brief
01:11:19 3 rebuttal?

01:11:20 4 MR. FREE: I did.

01:11:21 5 THE COURT: Brief.

01:11:24 6 MR. FREE: Very briefly. I want to leave the Court
01:11:33 7 with two quick thoughts. First, this is a 12(b)(6) motion.
01:11:40 8 Your Honor has questions about the facts of employment at the
01:11:44 9 Northwest Detention Facility. There are contract issues that
01:11:49 10 could be elucidated through discovery. At this point, the
01:11:53 11 question is: Have the plaintiffs plausibly stated a claim
01:11:57 12 upon which the motion can be granted? If any of the factual
01:12:00 13 questions you have been interested in or that Geo has raised
01:12:03 14 would determine the way the Court comes out, the appropriate
01:12:06 15 answer is deny the motion, let's do some discovery, even if
01:12:11 16 it is limited as to the preemption question.

01:12:13 17 Second, this is not criminal detention. This is civil
01:12:19 18 detention. This is not publicly-run detention. This is
01:12:23 19 private detention, unlike a public facility where every
01:12:29 20 detainee's work is going to enrich the taxpayer by saving the
01:12:35 21 taxpayer a dollar on paying or however much on what that is.
01:12:39 22 Every detainee in this case is in some respect enriching Geo.
01:12:47 23 That is different from Alvarado Guevara, which is a
01:12:49 24 publicly-run facility. The motion that is currently pending
01:12:53 25 before this Court to seal the contract explains to the Court

01:12:58 1 why. Geo has said you can't post on Pacer our bed date
01:13:03 2 rates, you can't post our detainee staffing plan because that
01:13:07 3 would help our competitors. The reason is they profit from
01:13:13 4 this detention and from this work. That is a --

01:13:18 5 THE COURT: Is that relevant at this stage?

01:13:21 6 MR. FREE: It is, Your Honor. The reason is because
01:13:24 7 Geo relies on Alvarado Guevara and the cases that talk about
01:13:29 8 detainee labor in the immigration detention context. To the
01:13:33 9 extent Your Honor is persuaded by that, we cite a case from
01:13:36 10 the Fifth Circuit that got decided months afterward that
01:13:39 11 says, no, when you are doing labor for a private party, the
01:13:44 12 FLSA can apply. That was a case out of Louisiana where the
01:13:49 13 sheriff had his inmates going to a third party farm and doing
01:13:52 14 work. Key distinction because that is the premise that Geo
01:13:56 15 relies on in the preemption and in the MWA argument it makes.
01:14:01 16 This is civil detention and private.

01:14:03 17 Thank you, Your Honor.

01:14:05 18 THE COURT: Ms. Chien.

01:14:10 19 MS. CHIEN: I want to make three points, Your Honor.
01:14:15 20 First, Geo repeatedly states the Minimum Wage Act doesn't
01:14:20 21 refer to the federal -- to the Northwest Detention Center
01:14:25 22 because the State is trying to, quote, stay in their own
01:14:29 23 lane. The Minimum Wage Act repeatedly has been applied to
01:14:33 24 federal contractors doing federal work. Doesn't matter. The
01:14:38 25 staying in your own lane, our minimum wage claim stays in our

01:14:42 1 own lane in the sense it applies within our own state.

01:14:45 2 Northwest Detention Center sits in our own state.

01:14:48 3 Second, Geo repeatedly refers to detention and immigration
01:14:54 4 as if it was a get-out-of-jail free card. Those are not
01:14:57 5 get-out-of-jail free cards. The Minimum Wage Act, the
01:15:00 6 legislature specifically considered detention and detention
01:15:05 7 facilities, and explicitly included in the exemption that
01:15:09 8 does not include Northwest Detention Center.

01:15:11 9 Finally, Geo states that the plaintiffs and the State are
01:15:16 10 trying to, quote, set the world on fire, requiring that Geo
01:15:20 11 comply with employee regulation. It seems to be so
01:15:26 12 burdensome for Geo that they are defending this litigation on
01:15:29 13 that basis. Employers on a daily basis, routine basis in
01:15:35 14 this state, comply with our minimum wage laws without the
01:15:38 15 burden, without setting the world on fire. They do it every
01:15:41 16 single day. It is not a burden.

01:15:44 17 Regarding the L&I guidelines that were placed on the ELMO
01:15:50 18 earlier, those are again similar to the PBNDS. Not binding.
01:15:56 19 Those are interpretations by L&I, much like the ICE
01:16:01 20 guidelines were interpretations but not binding. What are
01:16:05 21 binding are regulations. Here, we have none from ICE or the
01:16:09 22 federal government indicating that Geo is not to pay detainee
01:16:13 23 workers minimum wage.

01:16:14 24 Thank you.

01:16:16 25 THE COURT: Thank you, Ms. Chien.

01:16:21 1 Do you wish to volunteer a closing thought here?

01:16:24 2 MS. MELL: Closing thought is: Why wouldn't you

01:16:27 3 follow Menocal and White? There was no hesitation by those

01:16:31 4 courts to understand that the application of the law to a

01:16:36 5 detention facility, whether the word "federal" was in the

01:16:39 6 code or not, was not disconcerting. It didn't matter because

01:16:44 7 the policy objectives are the same. There still has to be a

01:16:48 8 discussion at the federal level, like you are indicating, at

01:16:51 9 the agency, with congress to decide the scope of work. It is

01:16:56 10 important that the Court understands, this is not like a

01:16:59 11 sheriff having the detainees go out and work the farm or

01:17:03 12 whatever the supposition is. That is the purpose of the

01:17:06 13 photographs. Side by side we see, it is: This is the jail.

01:17:14 14 People in jail have not been convicted. They are working for

01:17:19 15 the betterment of the jail and to keep it safe, to keep it

01:17:23 16 clean, to feed themselves. We are talking about the secure

01:17:27 17 side. We are talking about their own food. We are talking

01:17:31 18 about their bunks, their bedding.

01:17:35 19 THE COURT: Maintaining their own space is a little

01:17:38 20 different than what we are talking about here. I think it is

01:17:41 21 pretty clear that they have an obligation to keep their own

01:17:45 22 space clean.

01:17:46 23 MS. MELL: It is on the continuum, though,

01:17:50 24 Your Honor. We haven't reached that continuum where congress

01:17:54 25 or where ICE has decided that there should be offsets because

01:17:59 1 we are still in the lower level realm of taking care of
01:18:03 2 oneself. Collectively, yes. But we are still in the
01:18:07 3 universe, and the whole continuum is what ICE and congress
01:18:12 4 gets to decide, not the courts.

01:18:14 5 THE COURT: Thank you.

01:18:16 6 MS. MELL: Thank you, Your Honor.

01:18:19 7 THE COURT: We are current on things. We will get
01:18:25 8 you an answer to these motions shortly. With the holiday
01:18:32 9 coming, it will probably be after that. I would expect in
01:18:36 10 the week following, we will have an opinion on these motions
01:18:40 11 to dismiss.

01:18:41 12 Thank you. You have been very helpful.

01:18:44 13 (The proceedings recessed.)

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ *Angela Nicolavo*

ANGELA NICOLAVO
COURT REPORTER